

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-95-5/18-R77.2
Date: 24 February 2012
Original: English

IN THE TRIAL CHAMBER III

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Judgement of: 24 February 2012

IN THE CONTEMPT CASE OF MILAN TUPAJIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF "JUDGEMENT ON
ALLEGATIONS OF CONTEMPT" ISSUED ON 24 FEBRUARY
2012**

Counsel for the Accused:
Mr. Aleksandar Lazarević

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I. PROCEDURAL BACKGROUND

1. On 23 September 2011, the Chamber issued the “Decision on Prosecution’s Motion to Subpoena Milan Tupajić” (“Decision”), granting the request of the Office of the Prosecutor (“Prosecution”) to issue a subpoena ordering Milan Tupajić (“Accused”) to appear and testify before the Chamber in the case of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T (“*Karadžić* case”) commencing on 3 October 2011. On the same day, the Chamber issued a confidential subpoena (“First Subpoena”)¹ ordering the Accused to testify before the Trial Chamber in the *Karadžić* case or to show good cause why the subpoena could not be complied with.² The First Subpoena stated that “[w]ilful failure to comply with the terms of this subpoena constitutes contempt of the Tribunal, pursuant to Rule 77 of the Rules, which is punishable by a term of imprisonment not exceeding seven years, a fine not exceeding 100,000 euros, or both”.³ On the same day, the Chamber requested the government of Bosnia and Herzegovina (“BiH”) to serve the First Subpoena on the Accused, to take all necessary measures to ensure that he appears to testify before the Chamber as indicated in the First Subpoena, and to provide a written report on the execution of the First Subpoena.⁴

2. On 10 October 2011, BiH submitted the memorandum of service of the First Subpoena and accompanying documentation, which included correspondence from the Accused and some medical documentation (“First Memorandum of Service”). These were all translated into English and filed confidentially on 26 October 2011. The First Memorandum of Service indicated that the Accused had read the First Subpoena and was unwilling to appear before the Chamber.⁵ In the accompanying correspondence, the Accused stated that although he had testified in the past at the Tribunal in the case of *Prosecutor v. Krajišnik* (“*Krajišnik* case”), he was unwilling to come to testify in the *Karadžić* case primarily due to his current medical problems but that there were also secondary reasons.⁶ The Accused submitted lengthy medical documentation in support of his claim that he was unfit to travel and testify.⁷

3. On 27 October 2011, the Prosecution filed confidentially the “Prosecution Motion for Order in Lieu of an Indictment and for Warrant of Arrest” (“Motion”) requesting the Chamber to issue an

¹ *Karadžić* case, Subpoena Ad Testificandum, confidential, 23 September 2011.

² *Karadžić* case, First Subpoena, p. 2.

³ *Karadžić* case, First Subpoena, p. 3.

⁴ *Karadžić* case, Order to the Government of Bosnia and Herzegovina Concerning Subpoena Ad Testificandum, confidential, 23 September 2011.

⁵ *Karadžić* case, First Memorandum of Service, pp. 3–4.

⁶ *Karadžić* case, First Memorandum of Service, pp. 4–7.

⁷ *Karadžić* case, First Memorandum of Service, Annex, pp. 1–13.

order in lieu of indictment charging the Accused with contempt of the Tribunal pursuant to Rule 77(A) and (G) of the Tribunal's Rules of Procedure and Evidence ("Rules") and an accompanying warrant of arrest and order for surrender directing the authorities of BiH to search for, arrest, detain, and surrender the Accused to the Tribunal.⁸ On the same day, Radovan Karadžić's legal advisor informed the Chamber that he would not be filing a response to the Motion.⁹

4. On 3 November 2011, the Chamber issued confidentially a second subpoena once again ordering the Accused to appear and testify in the *Karadžić* case ("Second Subpoena").¹⁰ The Chamber noted that the reasons provided by the Accused for his refusal to comply with the First Subpoena did not constitute a just excuse and therefore reiterated its order requiring to him to appear and testify in the *Karadžić* case on 28 November 2011 or to show good cause why he could not so comply.¹¹ On the same day, the Chamber issued an order to BiH to serve the Second Subpoena on the Accused, to take all necessary measures to ensure that he appears to testify before the Chamber as indicated in the Second Subpoena, and to provide a written report on the execution of the Second Subpoena.¹²

5. On 8 November 2011, BiH submitted the memorandum of service of the Second Subpoena ("Second Memorandum of Service"). This was translated into English and filed confidentially on 11 November 2011. The Second Memorandum of Service indicated that the Accused continued to refuse to comply with the Second Subpoena and stated that his reasons were given to the Chamber previously.¹³ The Accused gave no additional information for his unwillingness to comply with the Second Subpoena.

6. On 30 November 2011, the Chamber issued an Order in Lieu of Indictment in which it ordered that the Accused be prosecuted for contempt of the Tribunal, punishable under Rule 77(A) and (G) of the Rules for

having been informed on 5 October 2011 and 8 November 2011, respectively, of the contents of the two subpoenas dated 23 September 2011 and 3 November 2011, and of his obligation to appear before the Chamber or to show good cause why he could not comply with the two subpoenas and therefore knowingly and wilfully interfering with the administration of justice

⁸ *Karadžić* case, Motion, para. 5.

⁹ *Karadžić* case, Hearing, T. 20453 (27 October 2011) (private session).

¹⁰ *Karadžić* case, Second Subpoena Ad Testificandum, confidential, 3 November 2011.

¹¹ *Karadžić* case, Second Subpoena, pp. 2–3.

¹² *Karadžić* case, Order to the Government of Bosnia and Herzegovina Concerning Second Subpoena Ad Testificandum, confidential, 3 November 2011.

¹³ *Karadžić* case, Second Memorandum of Service, pp. 2–3.

by refusing to comply with the Chamber's First Subpoena of 23 September 2011 and Second Subpoena of 3 November 2011.¹⁴

On the same day, the Chamber issued confidentially a warrant for arrest and order for surrender to the authorities of BiH to arrest, detain, and promptly surrender the Accused to the Tribunal.¹⁵

7. On 15 December 2011, the Accused was transferred to the seat of the Tribunal in The Hague and was detained at the United Nations Detention Unit ("UNDU") upon his arrival.¹⁶ The following day the Deputy Registrar assigned Mr. Eugene O'Sullivan as Duty Counsel.¹⁷

8. On 16 December 2011, the initial appearance of the Accused was held before the Presiding Judge.¹⁸ The Accused maintained his position that he would not testify in the *Karadžić* case and pleaded not guilty to the charges against him.¹⁹

9. On 19 December 2011, the Accused applied for provisional release,²⁰ which was granted by the Chamber on 21 December 2011.²¹ On 22 December 2011, the Chamber ordered that the Accused return to the UNDU by 18 January 2012 and scheduled a pre-trial conference for 20 January 2012 to be followed by the start of trial.²²

10. On 13 January 2012, the Deputy Registrar assigned Mr. Aleksandar Lazarević as permanent counsel to the Accused.²³ The Accused returned to the seat of the Tribunal on 17 January 2012.

11. On 17 January 2012, the Accused filed confidentially the "Motion to Postpone the Hearing in the Contempt Case of Milan Tupajić", requesting that the trial initially scheduled for 20 January 2012, be postponed for ten days but suggesting that the pre-trial conference could be held as scheduled.²⁴ On the same day, the Chamber maintained the schedule of the pre-trial conference for 20 January 2012.²⁵ On 20 January 2012, the Chamber held the Pre-Trial Conference and granted the

¹⁴ Order in Lieu of Indictment, confidential, 30 November 2011, para. 9. The confidentiality was lifted on 14 December 2011.

¹⁵ Warrant of Arrest and Order for Surrender, confidential, 30 November 2011. The confidentiality was lifted on 14 December 2011.

¹⁶ Order for Detention on Remand, 15 December 2011.

¹⁷ Decision by the Deputy Registrar on Assignment of Duty Counsel for Milan Tupajić, 16 December 2011.

¹⁸ Order Designating a Judge for Initial Appearance, 15 December 2011; Scheduling Order for Initial Appearance, 15 December 2011.

¹⁹ Initial Appearance, T. 3, 5 (16 December 2011).

²⁰ Mr. Tupajić's Motion for Provisional Release, 19 December 2011.

²¹ Decision on Motion for Provisional Release, 21 December 2011.

²² Scheduling Order for Commencement of Trial and Order Terminating Provisional Release, 22 December 2011, pp. 2-3.

²³ Decision by the Deputy Registrar on Assignment of Counsel to Milan Tupajić, 13 January 2012.

²⁴ Motion to Postpone the Hearing in the Contempt Case of Milan Tupajić, confidential, 17 January 2012, para. 9.

²⁵ Decision on Motion to Postpone Trial Hearing, 17 January 2012, p. 3.

Defence's request that the trial be held on 3 February 2012, in order to give the Accused and his counsel sufficient time to prepare.²⁶

12. The trial was held on 3 February 2012. The Chamber started by giving a summary of the case against the Accused.²⁷ The Defence did not call any witnesses other than the Accused himself and the Chamber admitted 20 Defence exhibits into evidence. The Defence presented its closing arguments and the trial concluded the same day.

II. APPLICABLE LAW

13. The Tribunal's power with respect to contempt is not expressly articulated in the Statute of the Tribunal ("Statute"). However, it is well-established that the Tribunal possesses an inherent power, deriving from its judicial function, to ensure that its exercise of the jurisdiction expressly bestowed to it by the Statute is not frustrated and that its basic functions are safeguarded.²⁸ The Tribunal therefore possesses an inherent power to deal with conduct interfering with its administration of justice.²⁹

14. Rule 77(A) of the Rules provides in relevant part:

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

[...]

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

[...]

15. To satisfy the *actus reus* of contempt under Rule 77(A), an order by a Chamber, whether oral or written, must be objectively breached.³⁰ The Appeals Chamber has held that a "violation of

²⁶ Scheduling Order for Commencement of Trial and Order Terminating Provisional Release, 22 December 2011, pp. 2–3; Pre-Trial Conference, T. 13 (20 January 2012).

²⁷ T. 17–18 (3 February 2012).

²⁸ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Milan Vujin Contempt Judgement*"), paras. 13–26; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001 ("*Nobile Appeal Judgement*"), para. 36; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para. 13.

²⁹ *Milan Vujin Contempt Judgement*, para. 13; see also *Nobile Appeal Judgement*, para. 30

³⁰ *In the Contempt Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009 ("*Hartmann Contempt Trial Judgement*"), para. 21.

a court order *as such* constitutes an interference with the International Tribunal's administration of justice".³¹

16. Furthermore, any knowing and wilful conduct in violation of a Chamber's order meets the requisite *mens rea* for contempt.³² In the *Contempt Case Against Florence Hartmann*, the Appeals Chamber upheld the Trial Chamber's finding that specific intent to interfere with the administration of justice was not necessary and that:

Where it is established that an accused had knowledge of the existence of a Court order, a finding of intent to violate the order will almost necessarily follow. Wilful blindness to the existence of the order, or reckless indifference to the consequences of the act by which the order is violated may satisfy the mental element. Mere negligence in failing to ascertain whether an order had been made is insufficient.³³

III. DISCUSSION

A. In relation to the *actus reus*

1. Did the Accused fail to comply with the Chamber's orders to appear for testimony?

17. The Accused did not appear to testify in the *Karadžić* case as ordered in the First Subpoena and again in the Second Subpoena (together "Subpoenas"). The Subpoenas issued by the Chamber imposed an obligation on the Accused to appear and give testimony in the *Karadžić* case.

18. The Chamber therefore considers that the Accused failed to comply with the Chamber's orders to appear for testimony as set forth in the Subpoenas.

2. Does the Accused have a just excuse for failing to comply with the Chamber's orders to appear for testimony?

(a) Health Reasons

19. The Accused submitted, in the First Memorandum of Service, that his primary reason for refusing to appear and testify before the Chamber related to his health concerns but that there were

³¹ *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R7-A, Judgement, 15 March 2007 ("*Jović* Contempt Appeal Judgement"), para. 30 (emphasis in original) (quoting *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006 ("*Marijačić and Rebić* Contempt Appeal Judgement"), para. 44.

³² *Hartmann* Contempt Trial Judgement, para. 53.

³³ *In the Contempt Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 128, upholding *Hartmann* Contempt Trial Judgement para. 22.

“also secondary reasons”.³⁴ He did not provide any additional reasons in the Second Memorandum of Service.

20. During the trial, the Accused submitted medical documentation to support his claim that his current health condition was an impediment to testifying in the *Karadžić* case. [REDACTED].³⁵ [REDACTED].³⁶ [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].³⁹ [REDACTED].⁴⁰

21. The Chamber has reviewed the documentation submitted by the Accused, and in particular those documents pertaining to the Accused’s health during the period after his testimony in the *Krajišnik* case in 2005 until the present,⁴¹ and is not of the view that the documents establish that the Accused’s current health concerns would have prevented him from testifying in the *Karadžić* case. Furthermore, the Chambers notes that despite his health concerns, the Accused was able to attend his own contempt trial but argued that he could not testify in the *Karadžić* case, as these are two different things.⁴² The Chamber is not persuaded by this argument in terms of his health concerns. For these reasons, the Chamber finds that the health reasons put forth by the Accused do not constitute a just excuse for his failure to comply with the Subpoenas within the meaning of Rule 77(A)(iii) of the Rules.

(b) [REDACTED] Concerns

22. [REDACTED].⁴³ [REDACTED].⁴⁴ [REDACTED].⁴⁵ [REDACTED].⁴⁶ [REDACTED].⁴⁷ [REDACTED].

23. [REDACTED].⁴⁸ [REDACTED].⁴⁹ [REDACTED].⁵⁰ [REDACTED].⁵¹ [REDACTED].⁵² [REDACTED].⁵³ [REDACTED].⁵⁴

³⁴ First Memorandum of Service, p. 4.

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ See [REDACTED].

⁴² T. 51–52 (3 February 2012).

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

24. [REDACTED],⁵⁵ [REDACTED].

25. [REDACTED].⁵⁶ [REDACTED].⁵⁷ [REDACTED].⁵⁸

26. The Chamber therefore considers that the Accused has not demonstrated any just excuse as to why he could not comply with the Subpoenas.

B. In relation to the *mens rea*

27. As to whether the Accused knowingly and wilfully interfered with the administration of justice, the Accused submitted that he was aware that he was acting contrary to specific instructions from the Tribunal as contained in the Subpoenas but that this was the decision he made.⁵⁹ He stated that he normally respected decisions of authorities in any situation; however, he could not act pursuant to the Subpoenas.⁶⁰

28. The First and Second Memoranda of Service established that the Accused was aware of the contents of the Subpoenas. At trial, the Accused testified that he was aware of the consequences of his failure to comply with the Subpoenas.⁶¹ Therefore, the Chamber finds that the Accused was able to comprehend the contents of the Subpoenas and the obligations imposed on him from their service until his arrest.

29. The Chamber concludes that the Accused knowingly and wilfully refused to comply with the Subpoenas.

C. Conclusion on the Responsibility of the Accused

30. The Chamber concludes that by failing to appear before the Chamber as ordered or to show just excuse as to why he could not comply with the Subpoenas, the Accused knowingly and wilfully interfered with the administration of justice and thereby committed contempt of the Tribunal punishable under Rule 77 of the Rules.

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ T. 70 (3 February 2012).

⁶⁰ T. 70 (3 February 2012).

⁶¹ T. 50–51 (3 February 2012).

IV. SENTENCING

31. The Chamber considers the dual nature of the purpose of punishing contempt. First, the punishment is retributive in that it punishes conduct that is found to obstruct, prejudice, or abuse the administration of justice.⁶² Second, the punishment has a deterrent effect which ensures to protect the interests of justice by preventing such action from occurring again in the future.⁶³ Therefore, in deciding the punishment to be imposed for contempt, Chambers have taken into consideration both the gravity of the conduct involved and the need to deter such conduct in the future.⁶⁴ Article 24 of the Statute and Rule 101 of the Rules contain guidelines for Trial Chambers in relation to the factors that should be taken into account when determining the punishment, such as aggravating and mitigating factors and the individual circumstances of the accused.

32. Rule 77(G) of the Rules states that the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal is a term of imprisonment of up to seven years, or a fine not exceeding 100,000 euros, or both. The Chamber is vested with broad discretion in determining the appropriate sentence for contempt.⁶⁵

33. Contempt of court is a serious offence which amounts to a direct interference with the administration of justice. In the exercise of its judicial function, the Tribunal is dependent on witness testimony and the deprivation of important evidence is a serious interference with the administration of justice. The Accused, by his refusal to comply with the Subpoenas, leading to his failure to appear at the seat of the Tribunal and testify, has acted against the interests of justice. In addition, his failure to testify has deprived the Chamber in the *Karadžić* case of relevant evidence.

34. The Chamber has considered the Accused's health and his current financial and family situation as mitigating factors. The Chamber has not considered any aggravating circumstance.

35. In the current case, taking into account the gravity of the offence, the Chamber holds that a single term of imprisonment of two months is appropriate to achieve the purpose for which the punishment is imposed.

⁶² See *Nobilo* Appeal Judgement, para. 36.

⁶³ See *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, para. 58.

⁶⁴ *Prosecutor v. Domagoj Margetić*, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007, para. 84; *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77, Judgement, 30 August 2006, para. 26; *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008, para. 103.

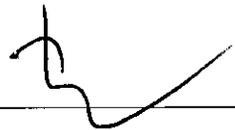
⁶⁵ *Jović* Contempt Appeal Judgement, para. 38.

V. DISPOSITION

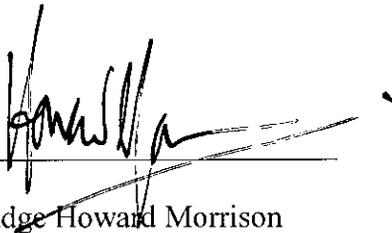
36. For the foregoing reasons, having considered all of the evidence and the submissions in this case, pursuant to the Statute of the Tribunal and Rule 77, the Chamber decides that:

- (1) The Accused, Milan Tupajić, is **GUILTY** of contempt of the Tribunal, punishable under Rule 77;
- (2) The Accused, Milan Tupajić, is hereby sentenced to a single sentence of two months of imprisonment;
- (3) The Accused, Milan Tupajić, pursuant to Rule 101(C) of the Rules is entitled to credit for time served in detention thus far;
- (4) The Registry shall take all the measures necessary for the execution of this sentence;
- (5) Upon service of his sentence, the Accused shall be released, as soon as any necessary formalities with the relevant authorities have been completed; and
- (6) The Chamber hereby renders concurrently a public and redacted version of this Judgement.

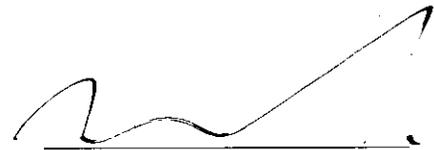
Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding



Judge Howard Morrison



Judge Melville Baird

Dated this twenty-fourth day of February 2012
At The Hague
The Netherlands

[Seal of the Tribunal]